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TRANSCRIPT OF STATUS CONFERENCE  
BEFORE THE HONORABLE DAVID A. EZRA  
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ARLINDA L. RODRIGUEZ, OFFICIAL COURT REPORTER  
U.S. DISTRICT COURT, WESTERN DISTRICT OF TEXAS (AUSTIN)

1 FOR THE DEFENDANTS: MUNERA AL-FUHAID  
2 JOHNATHAN STONE  
3 ZACHARY BERG  
4 KYLE STEPHEN TEBO  
5 OFFICE OF THE ATTORNEY GENERAL  
6 PO BOX 12548  
7 AUSTIN, TX 78711-2548  
8  
9 RYAN DANIEL WALTERS  
10 OFFICE OF THE TEXAS ATTORNEY GENERAL  
11 SPECIAL LITIGATION DIVISION  
12 209 WEST 14TH STREET, 7TH FLOOR  
13 AUSTIN, TEXAS 78701  
14  
15 APPEARING AT THE COURT'S REQUEST:  
16 LANORA CHRISTINE PETTIT  
17 OFFICE OF THE TEXAS ATTORNEY GENERAL  
18 OFFICE OF THE SOLICITOR GENERAL  
19 P.O. BOX 12548 (MC-059)  
20 AUSTIN, TEXAS 78711-2548  
21  
22 FOR MS. PETTIT: JOSEPH N. MAZZARA  
23 OFFICE OF THE TEXAS ATTORNEY GENERAL  
24 P.O. BOX 12548 (MC-059)  
25 AUSTIN, TX 78711-2548  
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27 COURT REPORTER: ARLINDA RODRIGUEZ, CSR  
28 501 WEST 5TH STREET, SUITE 4152  
29 AUSTIN, TEXAS 78701  
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09:31:53 1 (Open court)

09:31:53 2 THE CLERK: AU:23-CV-853, *United States of*  
09:31:56 3 *America v. Abbott, et al.*

09:31:58 4 THE COURT: May we have appearances, please.

09:32:02 5 MR. WADE: Good morning, Your Honor. This is  
09:32:04 6 Landon Wade with the U.S. Attorney's office for the  
09:32:06 7 Western District of Texas on behalf of the United States.

09:32:08 8 THE COURT: Okay. And we do have the other  
09:32:10 9 lawyers who are appearing by phone. Can we have their  
09:32:13 10 appearances.

09:32:15 11 MR. LYNK: Good morning, Your Honor. This is  
09:32:17 12 Brian Lynk. And I believe on the phone with me are  
09:32:25 13 Andrew Knudsen, Kimere Kimball, Bryan Harrison, our  
09:32:27 14 supervisor Angeline Purdy, and Mary Kruger, also from the  
09:32:31 15 U.S. Attorney's office.

09:32:33 16 THE COURT: Okay. Thank you.

09:32:34 17 And can I have for the State of Texas.

09:32:37 18 MR. WALTERS: Good morning, Your Honor.

09:32:39 19 THE COURT: Good morning.

09:32:39 20 MR. WALTERS: Ryan Walters for the defendants.  
09:32:43 21 With me are my colleagues Johnathan Stone, Munera  
09:32:47 22 Al-Fuhaid, Zach Berg, and Kyle Tebo.

09:32:49 23 THE COURT: Okay. All right. And I had  
09:32:53 24 invited, but had not ordered, Ms. Pettit to be here. Is  
09:32:57 25 she here today?

09:33:01 1 MR. MAZZARA: Yes, Your Honor. She's here, and  
09:33:01 2 I'm representing her. I'm her counsel, Joseph Mazzara,  
09:33:04 3 for the purposes of this hearing today.

09:33:06 4 THE COURT: Mr. Mazzara, are you licensed here  
09:33:08 5 in the Western District of Texas.

09:33:09 6 MR. MAZZARA: No. But the courtroom deputy  
09:33:12 7 requested that I come before the bar to sit here, just to  
09:33:15 8 make it easy with the microphone.

09:33:17 9 THE COURT: No. I don't have a problem. You  
09:33:19 10 can sit right up here. I have no concern where you're  
09:33:22 11 sitting. I just wanted to know whether you were  
09:33:25 12 licensed. Now, if you're not licensed, technically, you  
09:33:28 13 cannot argue.

09:33:31 14 MR. MAZZARA: Right. Yes, Your Honor. I  
09:33:33 15 understand that. But given the short notice of the  
09:33:34 16 hearing, putting in a *pro hac vice* application didn't  
09:33:40 17 seem to be feasible. But, again, I'm just here on a very  
09:33:44 18 limited capacity.

09:33:45 19 THE COURT: All right. Well, I -- let me --  
09:33:46 20 let me clear any concerns that Ms. Pettit might have. If  
09:33:51 21 I were here for the purpose of sanctioning Ms. Pettit,  
09:34:00 22 the order would have said so. It would have been an  
09:34:03 23 order to show cause why she should not be sanctioned.

09:34:07 24 I am not sanctioning Ms. Pettit. I am not mad  
09:34:11 25 at Ms. Pettit. I am not going to be criticizing

09:34:17 1 Ms. Pettit personally. I am concerned about the filing  
09:34:21 2 that was made, and I'm going to be questioning her about  
09:34:25 3 that filing. But I am not in any way, shape, or form  
09:34:31 4 going to be doing anything to her that she would require  
09:34:38 5 an attorney.

09:34:40 6 MR. MAZZARA: Yes, Your Honor. Except for the  
09:34:42 7 fact that you're going to be questioning her. She's an  
09:34:44 8 attorney for the State, for sure, the second senior most  
09:34:47 9 litigator, in fact, for the State of Texas.

09:34:50 10 THE COURT: Well, I'm very pleased to have her  
09:34:51 11 here.

09:34:52 12 MR. MAZZARA: But he she's not made an  
09:34:54 13 appearance in this case.

09:34:55 14 THE COURT: Well, she did, actually. She filed  
09:34:58 15 this in this case.

09:35:00 16 MR. MAZZARA: But --

09:35:00 17 THE COURT: Yes, sir?

09:35:02 18 MR. MAZZARA: In the appellate court. Yes,  
09:35:03 19 sir.

09:35:04 20 THE COURT: Yes. It doesn't matter. We are  
09:35:06 21 one federal court, sir.

09:35:08 22 MR. MAZZARA: I understand that, Your Honor.  
09:35:10 23 There are two case numbers. But, again, she --

09:35:12 24 THE COURT: Yeah. Well, her filing was  
09:35:15 25 rejected by the Court of Appeals. Did you know that?

09:35:19 1 MR. MAZZARA: Your Honor, I'm representing  
09:35:21 2 Ms. Pettit in this matter.

09:35:22 3 THE COURT: Yes. I'm just asking you: Were  
09:35:24 4 you aware of that?

09:35:25 5 MR. MAZZARA: No, I was not. When was it  
09:35:27 6 rejected, Your Honor?

09:35:28 7 THE COURT: It was rejected yesterday. The  
09:35:29 8 case was closed. You didn't know that it was rejected?  
09:35:35 9 Did the State know it was rejected?

09:35:39 10 MR. STONE: Your Honor, it was unfilled, but we  
09:35:40 11 believe that it was refiled last --

09:35:41 12 MR. WALTERS: It was refiled last night.

09:35:43 13 THE COURT: Oh. Did they refile it?

09:35:44 14 MR. WALTERS: Yes, Your Honor.

09:35:45 15 THE COURT: Okay. Then I'm going to direct  
09:35:47 16 that this transcript be filed, then.

09:35:51 17 MR. MAZZARA: And I believe they circulated it  
09:35:52 18 to the entire *en banc* court as well.

09:35:54 19 THE COURT: Oh, okay. Well, that was not -- I  
09:35:56 20 was not made aware of that. That's fine.

09:35:59 21 So I'd like Ms. Pettit to come forward.

09:36:04 22 MR. MAZZARA: Yes, Your Honor. Just a real  
09:36:06 23 quick question before she does, just for the record.  
09:36:08 24 What -- again, she's not an attorney in the case. Are  
09:36:10 25 you asking her to appear as a witness?

09:36:12 1 THE COURT: I'm not asking her to appear as a  
09:36:14 2 witness. She wrote a letter which addressed my comments  
09:36:17 3 in this court, and I'm trying to find out the basis for  
09:36:22 4 what she said, number one.

09:36:24 5 MR. MAZZARA: Yes, Your Honor.

09:36:25 6 THE COURT: Number --

09:36:25 7 MR. MAZZARA: Sorry.

09:36:26 8 THE COURT: Just a minute, sir. Let the court  
09:36:28 9 finish. I will give you plenty of opportunity.

09:36:30 10 Number one. I want to make sure that -- as I  
09:36:36 11 thought when I left the bench yesterday, we were on even  
09:36:41 12 keel here and knew where we were going with this case.  
09:36:43 13 And then this thing comes flying in which raised some  
09:36:47 14 concern to me. So I need to address it so that I am  
09:36:53 15 absolutely sure that going forward we are on the same  
09:36:57 16 path. And that has, sir, nothing to do with you. That  
09:37:02 17 has to do with the gentlemen who represent the State of  
09:37:04 18 Texas.

09:37:05 19 MR. WALTERS: Your Honor, in that light, we --  
09:37:08 20 I'm sure the Court understands that we -- no one here  
09:37:11 21 will be able to talk about any of the internal  
09:37:14 22 deliberations within the Attorney General's Office or  
09:37:17 23 with our clients about the motivation or decisions to  
09:37:20 24 file this letter to the Fifth Circuit.

09:37:26 25 THE COURT: I have no concern about that. I'm

09:37:27 1 not asking anybody about internal deliberations in the  
09:37:30 2 Attorney General's Office. That is not my purpose here.

09:37:39 3 MR. MAZZARA: So, Your Honor, again, just for  
09:37:42 4 Ms. Pettit, I mean, any questions regarding the letter  
09:37:45 5 would be -- would fall under any number of privileges.

09:37:48 6 THE COURT: No, it doesn't. It's publicly  
09:37:50 7 filed.

09:37:50 8 MR. MAZZARA: Not the letter. It's not the  
09:37:52 9 words, the text of the letter itself, but any mental  
09:37:56 10 impressions she had or any thought she had that went  
09:37:57 11 into --

09:37:58 12 THE COURT: I have every right and obligation  
09:38:00 13 to address the matters that are in the letter, so you may  
09:38:04 14 be seated, sir.

09:38:07 15 Now, Ms. Pettit, you were -- this is your  
09:38:10 16 letter? You wrote the letter?

09:38:12 17 MS. PETTIT: Yes, sir.

09:38:12 18 THE COURT: But you weren't here yesterday?

09:38:14 19 MS. PETTIT: No, Your Honor. As I noted in the  
09:38:15 20 letter, I was not present.

09:38:17 21 THE COURT: Right. Now, you filed this under  
09:38:19 22 Rule 28(j). You had this filed. It says: Pursuant to  
09:38:27 23 Rule 28(j), counsel notified the Court of developments  
09:38:31 24 during today's status conference in which the court may  
09:38:34 25 wish to be aware before it issues its forthcoming



09:38:38 1 mandate.

09:38:41 2 MS. PETTIT: Yes, Your Honor.

09:38:41 3 THE COURT: That case is essentially closed,  
09:38:43 4 but all right. Let's talk about whether this is a Rule  
09:38:46 5 28(j) letter, all right?

09:38:48 6 MS. PETTIT: Your Honor, that is the nature of  
09:38:50 7 the refilling. The Court asked us to file it simply as a  
09:38:53 8 letter and not pursuant to Rule 28(j), because the  
09:38:55 9 opinion had been issued but not the mandate.

09:38:58 10 THE COURT: Okay. Well, it isn't a Rule --  
09:39:00 11 what is it, then, if -- it's just an attempt to do what.

09:39:06 12 MS. PETTIT: It's an attempt to keep the Court  
09:39:08 13 apprised of developments similar to when this Court  
09:39:11 14 issued a number of advisements. We filed those under  
09:39:14 15 Rule 28(j) as well because there was no way other -- that  
09:39:16 16 we could tell, other than that under the rule --

09:39:18 17 THE COURT: Well, when you initially filed it,  
09:39:20 18 you filed it as Rule 28(j) letter, and it isn't -- as the  
09:39:26 19 Court of Appeals has indicated, it isn't a Rule 28(j)  
09:39:30 20 letter. And the reason it isn't is because it doesn't  
09:39:33 21 address any of the issues, whatsoever, that are before me  
09:39:41 22 for the purposes of the hearing I had yesterday.

09:39:46 23 MS. PETTIT: Your Honor, it apprised the Fifth  
09:39:47 24 Circuit of the hearing yesterday, which has been at issue  
09:39:50 25 in a number of prior letters that we filed. And we were

09:39:53 1 simply keeping the Court apprised.

09:39:55 2 THE COURT: It has nothing to do with what we  
09:39:57 3 were doing yesterday. What we were doing yesterday was  
09:40:00 4 going forward pursuant to the Fifth Circuit's ruling.  
09:40:12 5 And the only issue that is now pending before the Fifth  
09:40:16 6 Circuit, pending right now, is the issue of whether the  
09:40:29 7 case is going to be tried to a jury or it's not going to  
09:40:32 8 be tried to a jury. That is the only issue, and that's a  
09:40:37 9 mandamus petition.

09:40:40 10 MS. PETTIT: Respectfully, Your Honor, the  
09:40:41 11 mandate has not issued in the primary case.

09:40:44 12 THE COURT: It doesn't matter whether the  
09:40:45 13 mandate has issued or not.

09:40:47 14 MS. PETTIT: The Court retains jurisdiction  
09:40:49 15 until the mandate does.

09:40:51 16 THE COURT: It doesn't matter. There's no  
09:40:52 17 litigation going on. There is -- the United States  
09:40:56 18 didn't file anything. The State didn't file anything.  
09:41:02 19 What happened here is you filed something which has  
09:41:08 20 absolutely nothing to do with anything other than  
09:41:13 21 attempting, I presume -- it isn't an appropriate filing.  
09:41:18 22 You're not appearing in this case, are you?

09:41:20 23 MS. PETTIT: No, Your Honor. I do not  
09:41:22 24 appear -- I did not appear in this case.

09:41:24 25 THE COURT: So you're kind of a volunteer, and

09:41:26 1 you write this letter to say -- you might as well just be  
09:41:32 2 somebody sitting --  
09:41:33 3 No. Sit down.  
09:41:37 4 MR. MAZZARA: Your Honor, I just wanted to --  
09:41:38 5 THE COURT: No, sir. Not yet.  
09:41:42 6 MR. MAZZARA: All right.  
09:41:43 7 THE COURT: I will give you plenty of  
09:41:44 8 opportunity.  
09:41:47 9 MR. MAZZARA: Fair enough, Your Honor. I just  
09:41:48 10 want to, again, lodge an objection to this line of  
09:41:51 11 questioning.  
09:41:52 12 THE COURT: I don't know what line of  
09:41:53 13 questioning you're talking about that there's an  
09:41:55 14 objection to. All I'm saying is she's not appeared, and  
09:41:59 15 she's acknowledged that she hasn't appeared.  
09:42:00 16 MR. MAZZARA: In this case, Your Honor, before  
09:42:02 17 the trial court.  
09:42:02 18 THE COURT: That's correct.  
09:42:04 19 MR. MAZZARA: Okay.  
09:42:05 20 THE COURT: She hasn't appeared here.  
09:42:09 21 MR. MAZZARA: She has appeared in the Fifth  
09:42:10 22 Circuit and argued the *en banc* case.  
09:42:13 23 THE COURT: That's fine. That is fine.  
09:42:15 24 MR. MAZZARA: But I also still stand on the  
09:42:17 25 objection about this line of questioning into

09:42:20 1 the appellate --

09:42:20 2 THE COURT: Counsel, listen. If you don't  
09:42:22 3 listen to me, I'm going to have to ask you to step  
09:42:26 4 outside. I told you I would give you plenty of  
09:42:29 5 opportunity to address the court, and you will have that  
09:42:34 6 opportunity and I respect your opportunity to do so. But  
09:42:39 7 I can't have you jumping up like a jack-in-the-box every  
09:42:42 8 two minutes.

09:42:44 9 MR. MAZZARA: Understood, Your Honor.

09:42:45 10 THE COURT: You're not even a member of this  
09:42:47 11 court. You're lucky that I'm even letting you say  
09:42:52 12 anything here.

09:42:53 13 MR. MAZZARA: Thank you, Your Honor.

09:42:55 14 THE COURT: So you wrote this letter, not  
09:43:01 15 having been present, and your letter unfortunately  
09:43:04 16 contains a number of inaccuracies.

09:43:09 17 MS. PETTIT: Respectfully, sir, we have checked  
09:43:12 18 it against the transcript that we got last night, and we  
09:43:16 19 consider it to be accurate and stand behind everything.

09:43:18 20 THE COURT: I'm very happy you did. I can  
09:43:20 21 assure you we did, and I know what I said.

09:43:22 22 So let's go through it, okay?

09:43:25 23 MS. PETTIT: Certainly.

09:43:26 24 THE COURT: First of all, you make a big deal  
09:43:29 25 out of the fact that, without prompting from either

09:43:32 1 party, the District Court raised the possibility that  
09:43:37 2 Judge Willett's opinion from the *en banc* court might not  
09:43:41 3 be precedential based on unspecified voices and chatter  
09:43:45 4 the District Court had heard or read from *ex parte*  
09:43:48 5 sources who suggested that the opinion was not entirely  
09:43:51 6 clear.

09:43:51 7 That is absolutely true. That is true. I will  
09:43:57 8 agree with you. I did raise it. The implication here is  
09:44:02 9 that the court did so for the purpose of attempting to  
09:44:06 10 encourage or announce its belief that Judge Willett's  
09:44:11 11 opinion was not precedential or that I did not have the  
09:44:15 12 authority or the right to raise it *ex parte*.

09:44:21 13 Let me read something to you, okay? This is  
09:44:23 14 from the Fifth Circuit. It comes from a case called  
09:44:30 15 *Ioannides v. The University of Texas M.D. Anderson*  
09:44:33 16 *Center*, 418 F. App'x 269. It's a Fifth Circuit 2011  
09:44:39 17 case. I presume it's unpublished, but it's okay.

09:44:41 18 Here's what it says: The District Court did  
09:44:45 19 not error by considering substantive process issues  
09:44:53 20 *sua sponte*, because the parties briefed it. As long as  
09:44:57 21 the parties are given notice and opportunity to brief an  
09:45:00 22 issue, the court can consider it *sua sponte*. Any issue.  
09:45:06 23 Ultimately, what matters is the party knew the issue  
09:45:09 24 could be considered by the District Court. So here we  
09:45:14 25 are asking the parties to brief what the law is

09:45:17 1 applicable at the bench trial, giving the parties notice  
09:45:21 2 and ability to brief it.

09:45:23 3 That was precisely what I was doing. I was  
09:45:29 4 calling the issue to the attention of the parties, which  
09:45:33 5 is not only my right, it is my obligation.

09:45:41 6 MS. PETTIT: Yes, Your Honor.

09:45:43 7 THE COURT: You got that?

09:45:44 8 MS. PETTIT: Yes, Your Honor.

09:45:44 9 THE COURT: Okay. And I wanted to give the  
09:45:46 10 parties the opportunity to brief it. This was written in  
09:45:50 11 the sense that I was somehow being proactive in  
09:45:57 12 supporting the theory that Judge Willett's opinion was  
09:46:03 13 not precedential, and I went out on my own to find an  
09:46:09 14 issue and then to encourage the parties to brief it. You  
09:46:13 15 make another misstatement there also, by the way, that  
09:46:16 16 you will find is not in the -- in the record. I'll get  
09:46:21 17 to that in just a minute.

09:46:22 18 So do you know who Judge Posner is?

09:46:33 19 MS. PETTIT: Yes, Your Honor.

09:46:33 20 THE COURT: Okay. Well, here's what  
09:46:36 21 Judge Posner says about this. He says: They want to do  
09:46:42 22 justice as well as merely not umpire disputes. And they,  
09:46:48 23 the district courts, should not be criticized when they  
09:46:51 24 point out to counsel a line of argument or inquiry that  
09:46:55 25 has been overlooked.

09:47:03 1 Courts of appeals -- and I know because I sat  
09:47:06 2 on the Ninth Circuit Court of Appeals for 35 years -- and  
09:47:10 3 district courts regularly ask the parties *sua sponte* to  
09:47:18 4 brief issues that the parties may not have been aware of  
09:47:22 5 or which the court feels should be briefed on both sides.

09:47:32 6 So long as the court gives the parties the  
09:47:35 7 opportunity to do so, and then fairly and adequately  
09:47:40 8 reviews those briefings and takes them under  
09:47:46 9 consideration, this circuit and every single circuit has  
09:47:54 10 said, including the Supreme Court -- which often does  
09:47:58 11 this, by the way -- that it is appropriate and, at times,  
09:48:05 12 necessary.

09:48:07 13 It is not and was not my intent, as you seem to  
09:48:13 14 imply here, to give to the parties some sort of marching  
09:48:24 15 orders. You did not point out in your letter, which it  
09:48:29 16 would have been fair for you to do if you were trying to  
09:48:33 17 write a balanced letter, that I had mentioned at least  
09:48:39 18 three to four times emphatically that I have not made up  
09:48:45 19 my mind in this matter; that I indeed might find  
09:48:54 20 Judge Willett's opinion precedential.

09:48:56 21 In fact, it is my fallback, and always has been  
09:49:02 22 for the over 30 years I've been on the bench, that when a  
09:49:07 23 majority opinion comes out, even if there are strong  
09:49:10 24 dissents, to follow that majority opinion. And my  
09:49:14 25 inclination is to do so here.

09:49:16 1 But there is an issue, and that issue needs to  
09:49:22 2 be briefed. Here's the reason: This case is not going  
09:49:26 3 to end with the Fifth Circuit. If by sending this letter  
09:49:32 4 it was your intent to alert Judge Ho that he had not  
09:49:38 5 written on this issue and to try to get him to amend his  
09:49:41 6 opinion, that might work. I don't know. It wouldn't  
09:49:47 7 look good, but it might work. I --

09:49:55 8 You'll get a chance.

09:49:58 9 So that's number one. What you should have  
09:50:03 10 said in this letter, if you were trying to be, as you  
09:50:08 11 say, just informing the Fifth Circuit, is that, oh, by  
09:50:12 12 the way, Judge Ezra did say on multiple occasions that he  
09:50:17 13 did not have his mind made up and that he might indeed  
09:50:22 14 rule for Judge -- that Judge Willett's opinion was  
09:50:26 15 precedential. But you didn't do that.

09:50:27 16 This is a -- this isn't a letter informing  
09:50:31 17 them. It wasn't a 28(j) letter. This was an argument.  
09:50:35 18 This is an argument trying to get the Fifth Circuit,  
09:50:38 19 either Judge Willett to rewrite his opinion or to get  
09:50:46 20 Judge Ho to change his opinion or to get judge -- Chief  
09:50:49 21 Judge Richman to somehow change her opinion. That's  
09:50:54 22 what -- I mean, it's pretty obvious.

09:50:56 23 So let's go on.

09:50:57 24 You say: Although undersigned was not present,  
09:51:07 25 the District Court reportedly opined that we have a



09:51:10 1 nine-nine split.

09:51:11 2 What I said is it appears that there's a  
09:51:14 3 nine-nine split. It could be a nine-nine split. I don't  
09:51:18 4 know. And even if there were, what's the effect of it?  
09:51:25 5 I don't know that either.

09:51:26 6 What I do know is that Judge Ho did not opine  
09:51:34 7 at all on the issue. He took a totally different tack.  
09:51:40 8 He felt that the case should be dismissed out of hand for  
09:51:47 9 jurisdictional reasons. So he partially dissented,  
09:51:50 10 actually. And we do know that Chief Judge Richman did  
09:51:57 11 not agree with the majority, in part. She joined in  
09:52:00 12 judgment, but she did not agree with the majority's  
09:52:03 13 reasoning that the way you -- on the way that you judge  
09:52:11 14 navigation, which was a hallmark of Judge Willett's  
09:52:16 15 opinion. We know she didn't agree with that.

09:52:18 16 So that leaves -- that leaves us with some  
09:52:23 17 uncertainty. I mean, you're a lawyer, right?

09:52:27 18 MS. PETTIT: Yes, Your Honor.

09:52:28 19 THE COURT: And you're a good one --

09:52:30 20 MS. PETTIT: Thank you, Your Honor.

09:52:31 21 THE COURT: -- or you wouldn't be in your  
09:52:32 22 position. So you have to understand that.

09:52:37 23 Now, you say, we have -- and then you say, and  
09:52:42 24 in quotes, as if this was all I said: Because  
09:52:47 25 Judge Richman did not agree with the majority --

09:52:50 1 I didn't say that. I didn't say she didn't  
09:52:52 2 agree with the majority. I said she didn't agree with  
09:52:54 3 the majority on the navigation issue only, which she  
09:52:59 4 didn't.

09:53:01 5 -- and the separate opinion by Judge Ho. And  
09:53:06 6 here you put this in quotes, "did not say anything at  
09:53:09 7 all," as if I was criticizing Judge Ho.

09:53:13 8 So let me make it very clear. I said  
09:53:16 9 specifically that I was not criticizing Judge Ho. I said  
09:53:22 10 that specifically. And I didn't say he didn't say  
09:53:26 11 anything at all. I said he didn't say anything at all on  
09:53:30 12 this issue, which he didn't. Not that he didn't say  
09:53:36 13 anything at all, as if he wrote a bunch of nonsense. I  
09:53:39 14 didn't say that. So why you left that out, I don't know.

09:53:47 15 Now, you say: Accordingly, the District Court  
09:53:51 16 ordered the parties to file additional briefs no later  
09:53:54 17 than September 20th -- that's true -- addressing the  
09:53:58 18 impact of the Court's *en banc* decision. That's also  
09:54:02 19 true. In the process the District Court provided  
09:54:06 20 citations to decisions that neither party had previously  
09:54:11 21 raised.

09:54:13 22 That's true: Supreme Court cases. I have every  
09:54:19 23 responsibility to draw the parties' attention to  
09:54:23 24 precedent. I believe that the Fifth Circuit is bound by  
09:54:28 25 the Supreme Court. I certainly am.

09:54:32 1 MS. PETTIT: Certainly, Your Honor.

09:54:33 2 THE COURT: Either party -- and then you say:

09:54:35 3 Either party might consider citing in support of an

09:54:40 4 argument the District Court need not follow

09:54:43 5 Judge Willett's opinion.

09:54:44 6 That is absolutely false. I did -- I dare you

09:54:49 7 to find, or any of your lawyers, anywhere in the

09:54:55 8 transcript where I said that, or even implied, these are

09:55:05 9 the cases that support an argument and I wanted them -- I

09:55:13 10 wanted the parties to follow that argument.

09:55:16 11 I said the opposite, the exact opposite. I

09:55:22 12 said these are cases that are out there. They do show

09:55:28 13 situations where there has been a split. I even gave as

09:55:40 14 support a case in which I handled as a member of the

09:55:42 15 Ninth Circuit Panel where there was a four-four split

09:55:47 16 because Justice Kagan could not participate because she

09:55:51 17 had been Solicitor General. And, on top of that, I said

09:56:03 18 that that was just an example.

09:56:05 19 But guess what? Where there is a four-four

09:56:08 20 split in the Supreme Court, it gets remanded to the

09:56:14 21 Circuit Court, the decision is upheld, but it isn't

09:56:17 22 precedential. You know that, right? You're a good

09:56:19 23 lawyer.

09:56:20 24 MS. PETTIT: It is precedential only to the

09:56:22 25 extent of what the issue was decided, but it is not

09:56:24 1 precedent for any arguments that were presented.

09:56:27 2 THE COURT: You're right, and you are correct.

09:56:30 3 It is only precedential in the Ninth Circuit. It isn't

09:56:33 4 nationwide precedent.

09:56:34 5 MS. PETTIT: Yes, Your Honor.

09:56:35 6 THE COURT: Because the Supreme Court did not

09:56:36 7 make a decision.

09:56:38 8 MS. PETTIT: Correct, Your Honor.

09:56:39 9 THE COURT: So I did not under any

09:56:44 10 circumstances tell the parties to look at these cases for

09:56:47 11 the purpose of finding Judge Willett's opinion to be

09:56:52 12 nonprecedential, as you say in this letter. I didn't do

09:56:55 13 that. You won't find it in the record. I looked again

09:56:59 14 to make sure. My law clerks looked again to be sure.

09:57:06 15 It's not there, because I didn't do it. It is

09:57:12 16 misleading.

09:57:20 17 Now, the District Court also ordered the party

09:57:22 18 to refile any pretrial filings and motions in limine on

09:57:27 19 October 28th, with objections to follow on October 30th.

09:57:31 20 That was at the request of your own lawyers.

09:57:39 21 Meanwhile, the District Court opined a lot of

09:57:41 22 people are shaking their heads at why the -- why Texas

09:57:45 23 demand for a jury trial.

09:57:46 24 It's true. I can't -- I personally, as I sit

09:57:55 25 here, don't know why Texas would want a jury trial in

09:57:58 1 this case. You see, I presumed you would want a jury  
09:58:02 2 trial if you thought that you had a sympathetic plaintiff  
09:58:11 3 or you had an issue which was somehow primed for a jury.  
09:58:23 4 This is on equitable case.

09:58:27 5 Would you like some water.

09:58:29 6 MS. PETTIT: No, thank you, Your Honor.

09:58:30 7 THE COURT: Okay. An equitable case. That was  
09:58:32 8 just an offhand comment. It wasn't anything more than an  
09:58:36 9 offhand comment. It had no precedential value. Who  
09:58:45 10 cares? You've asked for a jury. The Fifth Circuit is  
09:58:49 11 looking at it, and they will rule. And whatever they  
09:58:51 12 rule, I will abide by. It doesn't matter to me.

09:58:56 13 But let's not forget something. It appears the  
09:59:00 14 State of Texas has some idea in its head -- from where, I  
09:59:04 15 don't know -- that I am not the right judge for this case  
09:59:09 16 because I've already made up my mind. I haven't. Or  
09:59:14 17 that I am prejudiced against the State of Texas. I am  
09:59:17 18 not.

09:59:18 19 Let's look at a little history. Not that long  
09:59:25 20 ago there was a law passed by the Texas State  
09:59:31 21 Legislature, a very popular law by some and unpopular by  
09:59:37 22 others, called the fetal burial law. Are you familiar  
09:59:41 23 with that?

09:59:41 24 MS. PETTIT: Yes, Your Honor.

09:59:42 25 THE COURT: Okay. Guess who handled that case?

09:59:44 1 MS. PETTIT: I believe you did, Your Honor.

09:59:46 2 THE COURT: I did. Now, the only decision that  
09:59:49 3 had been rendered on that exact law was rendered by the  
09:59:55 4 Tenth Circuit. They had ruled that that statute -- not  
10:00:03 5 the Texas one, but the one that they were dealing with,  
10:00:06 6 which is exactly the same -- was flat-out  
10:00:11 7 unconstitutional, and they struck it down.

10:00:15 8 And then there was an appeal by the State to  
10:00:17 9 the United States Supreme Court which was pending at the  
10:00:21 10 time I made my ruling. So the only decision out there on  
10:00:26 11 the fetal burial law was that it was unconstitutional,  
10:00:30 12 and that was by a circuit court of appeals, not a  
10:00:33 13 district court.

10:00:33 14 I looked at it very carefully, and my view was  
10:00:41 15 that the Tenth Circuit was wrong, that Texas was right,  
10:00:43 16 and I ruled for the State of Texas that the law was in  
10:00:46 17 fact constitutional. Subsequently, the Supreme Court  
10:00:55 18 reversed the Tenth Circuit and found the law  
10:00:59 19 constitutional.

10:01:02 20 Now, we didn't get a full ruling on that case  
10:01:04 21 because that case basically mooted the issue. It went  
10:01:12 22 away. So Judge Costa and the rest of that panel end up  
10:01:18 23 dismissing the case. That was a big ruling, it was a  
10:01:23 24 tough ruling, and I ruled for the State, as I have in  
10:01:26 25 many other cases, including this one.

10:01:30 1 In this case the United States had two causes  
10:01:33 2 of action. After very thorough briefing, and it was a  
10:01:40 3 very tough issue, I ruled for the State of Texas in this  
10:01:43 4 case and dismissed that cause of action.

10:01:47 5 Are you aware of that?

10:01:49 6 MS. PETTIT: Yes, Your Honor.

10:01:50 7 THE COURT: All right. Now, finally, let's get  
10:01:57 8 to the last part of it, because this is what really kind  
10:02:01 9 of made me -- really got me puzzled.

10:02:09 10 You say: Texas' demand for a jury trial, and  
10:02:18 11 indicated that I may reopen discovery, but only if the  
10:02:24 12 Fifth Circuit holds Texas is entitled to a jury. Okay.  
10:02:32 13 Because the circumstances would have changed, in my view.

10:02:39 14 This was put in here, for whatever reason, I  
10:02:43 15 presume to indicate that somehow I was favoring the  
10:02:47 16 federal government by reopening discovery. Let me read  
10:02:51 17 you, if I may, from the transcript of what Mr. Walters --

10:02:59 18 Help me find this, will you, Rose?

10:03:01 19 -- what Mr. Walters said, because I thought  
10:03:03 20 Mr. Walters made an excellent point. Okay? Can you help  
10:03:09 21 me find -- right here on my papers somewhere. Where is  
10:03:14 22 it? Because I don't want to keep them here unnecessarily  
10:03:19 23 for a long time while I'm searching for this. You had  
10:03:25 24 highlighted what Mr. Walters had said somewhere.

10:03:35 25 Come up here. Help me find it.

10:04:01 1 I want to quote you correctly, Mr. Walters.

10:04:03 2 MR. WALTERS: I appreciate it, Your Honor.

10:04:12 3 THE COURT: Okay. Here's the discussion that  
10:04:15 4 you were so concerned about, all right? It started with  
10:04:17 5 Mr. Lynk. This is where I said I may reopen discovery.

10:04:23 6 "MR. LYNK: Understood. On August the 2nd, on  
10:04:27 7 Friday, obviously, there were a number of things that  
10:04:30 8 originally were due, and we understood that those were  
10:04:34 9 suspended as of last week under the -- in the  
10:04:37 10 circumstances.

10:04:39 11 "THE COURT: What were those?

10:04:41 12 "Generally, the response to July 26th pretrial  
10:04:44 13 filing: objections to witnesses, objections to things  
10:04:47 14 like, that." That's Mr. Lynk.

10:04:50 15 "THE COURT: Those I think probably should  
10:04:53 16 wait. And the reason for this is that we're still  
10:04:59 17 waiting to figure out whether we have a jury or we don't  
10:05:02 18 have a jury. And you may decide to go with certain  
10:05:07 19 witnesses if you have a jury. I may even allow, because  
10:05:13 20 if -- if it stays the way it is, if the Fifth Circuit  
10:05:16 21 rules there is no jury in this case, because it's  
10:05:19 22 equitable, then I won't reopen.

10:05:21 23 "But if we -- if we have a change in the  
10:05:24 24 landscape and say, well, you're going to have a jury now  
10:05:30 25 out of the blue, then I may allow the parties to add



10:05:33 1 additional witnesses. And that may impact our trial  
10:05:36 2 date."

10:05:36 3 In fairness to both parties, by the way.

10:05:42 4 "MR. WALTERS: We would suggest that if the  
10:05:47 5 Court is considering reopening discovery -- so we don't  
10:05:51 6 know that yet, whether the Department of Justice wants  
10:05:53 7 that -- when the Fifth Circuit rules on our right to a  
10:05:56 8 jury trial --

10:05:58 9 "THE COURT," here's what I say: "I can assure  
10:06:00 10 you that will not happen if they deny the request for a  
10:06:05 11 jury trial, only because then that -- that means that the  
10:06:08 12 tenor of the case has been the same since its inception."

10:06:11 13 It was only recently that Texas really asked  
10:06:15 14 for a jury.

10:06:17 15 All right.

10:06:17 16 "MR. WALTERS: Right. What we're saying --"

10:06:22 17 And this is the Court, but -- this is me, now.

10:06:25 18 "But if they -- if they say the State gets a  
10:06:29 19 jury or gets a partial jury trial on some issues but not  
10:06:34 20 others, then I would consider it. I'm not saying I would  
10:06:37 21 grant it, but I would certainly consider it."

10:06:40 22 Now, here's the critical part. This is  
10:06:45 23 Mr. Walters, your lawyer.

10:06:47 24 "But, Your Honor, I guess our position is that,  
10:06:51 25 if the Fifth Circuit were to find we are entitled to a

10:06:55 1 jury trial, the Court would have to resolve these motions  
10:06:58 2 again because the standard would be different. So we  
10:07:07 3 would suggest not wasting the Court's time in resolving  
10:07:10 4 these motions before we get a ruling from the  
10:07:12 5 Fifth Circuit on --"

10:07:15 6 Then I say: "I don't know that the legal  
10:07:16 7 standard would be different."

10:07:19 8 And here's Mr. Walters:

10:07:22 9 "Well, the standard for considering, like,  
10:07:25 10 experts" -- which is what I was concerned about --  
10:07:28 11 "whether they're going to be excluded or not, would be  
10:07:30 12 different."

10:07:31 13 And here's what I say to Mr. Walters:

10:07:34 14 "Oh, I see what you're saying, in a practical  
10:07:37 15 sense. Yeah. I would agree with you. I told you I will  
10:07:42 16 take a look at it. I haven't made up my mind on that,  
10:07:46 17 yet. I'll take a good look at it, okay?

10:07:49 18 "MR. WALTERS: Thank you."

10:07:52 19 That's what that was all about. Your side  
10:08:00 20 appropriately, because they're trial lawyers and they're  
10:08:05 21 good ones, is concerned that if the tenor of the case  
10:08:08 22 changes from a nonjury trial to a jury trial, they may  
10:08:12 23 need or may ask me to add an additional witness or two  
10:08:16 24 because they've got to prove the case to the jury.

10:08:18 25 I have been involved in this case for a very

10:08:22 1 long time, and I understand the landscape. I know what's  
10:08:29 2 there. I've heard lots and lots of testimony in this  
10:08:32 3 case. So they would not have to educate me on the facts  
10:08:39 4 or on the expert opinions, because I've heard it, or at  
10:08:46 5 least part of it.

10:08:49 6 But a jury is different. They come in with a  
10:08:54 7 clean slate. They have not heard it. They have not seen  
10:08:57 8 it. They don't know what it's all about. So they need  
10:09:02 9 to be carefully educated. That was my concern.

10:09:11 10 You can be seated. Thank you very much.

10:09:13 11 MS. PETTIT: Thank you.

10:09:17 12 MR. WALTERS: Your Honor, if I could just ask a  
10:09:19 13 brief question. In our -- in the letter that was filed  
10:09:21 14 in the Fifth Circuit, the last line references this:  
10:09:24 15 When transcripts became available, we would submit them  
10:09:29 16 to the Fifth Circuit. I understand Your Honor has  
10:09:32 17 expressed a lot of concern about the Fifth Circuit not  
10:09:35 18 getting the full context of what occurred in yesterday's  
10:09:38 19 hearing. So we would ask for your direction as to  
10:09:41 20 whether you would like the rough transcripts of both  
10:09:44 21 yesterday --

10:09:44 22 THE COURT: The final transcript is done, is it  
10:09:47 23 not? The final transcript is done. I'm not trying to  
10:09:53 24 hide anything from the Fifth Circuit. Believe me. First  
10:09:57 25 of all, I've spent 35-plus years of my life having

10:10:01 1 everything I said put down in writing. I'm not running  
10:10:09 2 away from yesterday.

10:10:11 3 What worries me and gave me concern is that  
10:10:15 4 this letter -- I'm not saying that Ms. Pettit did this  
10:10:22 5 intentionally. I -- to be honest with you, I've heard  
10:10:26 6 nothing but good things about Ms. Pettit, to be honest  
10:10:30 7 with you. I've heard that she's a good lawyer, and I  
10:10:34 8 heard that she does her job well. And I have no personal  
10:10:40 9 animus whatsoever against Ms. Pettit.

10:10:45 10 But my concern is this. My concern is this:  
10:10:51 11 Somebody -- and I don't think it's really Ms. Pettit.  
10:10:54 12 But somebody seems to think that by sending a letter like  
10:10:59 13 this in to the Fifth Circuit, they are in a position to  
10:11:07 14 influence the Fifth Circuit to do something they might  
10:11:10 15 not otherwise do. Why else would the letter be sent?

10:11:17 16 And I don't even know whether she actually  
10:11:20 17 drafted the letter. My -- maybe, but maybe not. The  
10:11:25 18 point is that it contains some flat-out inaccuracies, but  
10:11:32 19 more important than that, half-truths. Things are taken  
10:11:36 20 out of context. And that -- that's a shame. The Fifth  
10:11:42 21 Circuit deserves better than that. You can be seated,  
10:11:45 22 Counsel.

10:11:45 23 MR. WALTERS: Thank You, Your Honor.

10:11:50 24 MR. STONE: I just wanted to add one thing.  
10:11:50 25 I'm sorry you feel that way. I want to add something

10:11:52 1 that -- just a point of correction for the last point  
10:11:53 2 that you were making with Ms. Pettit, specifically about  
10:11:56 3 reopening discovery.

10:11:57 4 At no point did Texas indicate that we were  
10:12:00 5 open to reopening discovery or that that was even on the  
10:12:03 6 table. That discussion that you quoted from Mr. Walters  
10:12:06 7 was specifically in reference to deciding motions like  
10:12:08 8 motions in limine.

10:12:09 9 THE COURT: Well, first of all, Mr. Walters can  
10:12:11 10 speak for himself. But, in any event, go ahead.

10:12:14 11 MR. STONE: It was specifically in reference  
10:12:16 12 things like motions in limine.

10:12:17 13 THE COURT: Yeah. I don't see anything here  
10:12:19 14 that says anything about motions in limine.

10:12:22 15 MR. STONE: As well as experts, Your Honor. We  
10:12:23 16 filed motions to exclude.

10:12:24 17 THE COURT: It doesn't -- but, Counsel, it  
10:12:25 18 doesn't matter. It doesn't matter. I said clearly that  
10:12:31 19 I had not made up my mind as to whether I would reopen  
10:12:36 20 discovery. I would hear argument on that. It just means  
10:12:41 21 that I had not made a decision, and the tenor of the  
10:12:46 22 letter that was sent indicated that I had. And I hadn't.  
10:12:50 23 And I made that very clear to Mr. Walters.

10:12:53 24 I said I would agree with you there. I agree  
10:12:58 25 with Mr. Walters. I frequently agree with Mr. Walters.

10:13:02 1 I agree with you there. I told you I will take a look at  
10:13:05 2 it. I haven't made up my mind on that yet. I will take  
10:13:10 3 a very good look at it.

10:13:13 4 That's what I said. So you can be seated.

10:13:17 5 MR. STONE: Your Honor, although I will add  
10:13:18 6 just for the record that I don't think that that final  
10:13:19 7 sentence in the letter doesn't -- I think it says exactly  
10:13:22 8 that, that you were open to the possibility of reopening  
10:13:25 9 discovery depending on whether or not -- depending on the  
10:13:27 10 outcome of that jury issue. That's what the letter said,  
10:13:32 11 Your Honor, just so the record reflects that. Thank you.

10:13:32 12 THE COURT: Let me look at it. I don't have it  
10:13:32 13 right in front of me. What did I do with it?

10:13:48 14 MR. STONE: I can read the sentence.

10:13:50 15 THE COURT: No. It's okay. I'm looking for  
10:13:51 16 it. I'll find it. It's here somewhere. Here it is. We  
10:14:15 17 found it. It got buried.

10:14:38 18 Okay I don't know why this sentence was put in  
10:14:40 19 the letter. I mean, it just doesn't make sense to me. I  
10:14:44 20 mean, why is it here?

10:14:45 21 MR. STONE: Because Texas will be materially  
10:14:48 22 prejudiced if you reopen discovery, in our opinion.

10:14:50 23 THE COURT: That's something we will decide.

10:14:52 24 MR. STONE: Agreed, Your Honor.

10:14:53 25 THE COURT: And I said that.

10:14:55 1 MR. STONE: Yeah.

10:14:55 2 THE COURT: But why is it here? Why is it in  
10:14:59 3 this letter? What does it have to do with anything? It  
10:15:02 4 doesn't have to do with anything.

10:15:05 5 The real key to this letter is Texas was trying  
10:15:09 6 to leave the impression with the *en banc* court that I had  
10:15:15 7 made a decision or that I had somehow indicated, God  
10:15:26 8 forbid, that there was an issue with respect to which was  
10:15:33 9 the controlling opinion, if any. And that is a terrible  
10:15:39 10 thing to do.

10:15:41 11 You know, I'll tell you what the worst part of  
10:15:44 12 this is. And I don't think it's true. I really don't  
10:15:49 13 think it's true. It could leave somebody with the  
10:15:54 14 impression that the State of Texas thinks they've got the  
10:15:57 15 Fifth Circuit in their back pocket.

10:15:59 16 Now, I don't think you believe that. I really  
10:16:04 17 don't think the Attorney General's Office believes that  
10:16:08 18 they have the State of Texas in their back pocket and  
10:16:12 19 they can just file anything they want, prejudice the  
10:16:17 20 Court against this Court, and get a successful ruling. I  
10:16:21 21 do not believe the Attorney General's Office believes  
10:16:24 22 that. If I did, you would know it.

10:16:31 23 MS. PETTIT: Your Honor, for the record, we  
10:16:33 24 definitely do not.

10:16:34 25 THE COURT: You don't have to tell me that. I

10:16:36 1 already said I don't believe that you do. But somebody  
10:16:40 2 who just read this and would say why did they send this  
10:16:43 3 in? What was purpose of it? What is the big, important  
10:16:49 4 issue here? I don't know. I don't know why it was sent  
10:17:00 5 in. It was ill-advised.

10:17:03 6 It really shouldn't have been sent, because  
10:17:06 7 it's neither a Rule 28(j) letter -- and if it's not a  
10:17:10 8 28(j) letter, what is it? It's just a notice to the  
10:17:15 9 Fifth Circuit that, gosh, you know that Judge David Ezra  
10:17:19 10 actually said that, with this big split court, there  
10:17:27 11 might be an issue as to whether Judge Willett's opinion  
10:17:32 12 is precedential. Heaven forbid.

10:17:41 13 Do you think Judge Willett, who I know well and  
10:17:44 14 who is a fine United States Circuit Judge of the highest  
10:17:49 15 integrity, is going to read this and not sleep at night  
10:17:54 16 and just say, oh, my God? He's going to read the  
10:17:58 17 transcript, and he's going to see that David Ezra said in  
10:18:02 18 multiple places that I have no opinion on that at all.

10:18:10 19 And I will say it again. My fallback position  
10:18:15 20 is that Judge Willett's opinion is precedential, and I'm  
10:18:21 21 inclined to find that it is. And I'll say that.

10:18:26 22 But there is an issue. We have a deeply  
10:18:32 23 divided opinion. And it is in Judge -- and it's a fact  
10:18:40 24 that Judge Ho did not weigh in on this issue. Maybe he  
10:18:44 25 will now. Maybe he'll file some sort of an amended



10:18:48 1 opinion now that he's gotten your letter. I don't know.  
10:18:51 2 But he could do that at any time. Maybe that was the  
10:18:55 3 purpose of it. I don't know. I hope not. Or maybe  
10:19:00 4 Judge Willett will file -- I have no idea.

10:19:07 5 But I surely don't understand, and have never  
10:19:12 6 in my entire career -- and I've handled big cases all  
10:19:21 7 across the country, big ones, much bigger than this. And  
10:19:29 8 I've handled big cases sitting on the Court of Appeals.  
10:19:31 9 I have never seen a letter like this filed, ever.

10:19:39 10 And maybe I'm just naive. No judge that I've  
10:19:48 11 raised this with and talked to about this, just asked  
10:19:54 12 them if this is a policy or if they've ever seen it,  
10:19:57 13 nobody had ever seen it. And we're talking about  
10:20:00 14 conservative judges now that I talked to. Nobody had  
10:20:03 15 ever seen it or heard of it.

10:20:09 16 And at the time we thought it was a rule, as  
10:20:16 17 you put it originally, a Rule 28(j) letter. They said,  
10:20:22 18 Well, that's obviously not a 28(j) letter.

10:20:28 19 And if it's not a 28(j) letter, then what is  
10:20:33 20 it? It's just telling them that I had a status  
10:20:36 21 conference with the parties, I raised an issue which I  
10:20:39 22 had heard -- I actually hadn't thought about it myself  
10:20:43 23 initially. I just read Judge Willett's opinion, I read  
10:20:46 24 all the other opinions and I just let it go at that and  
10:20:50 25 set the status conference.

10:20:51 1 But then I heard some chatter. And then I  
10:20:59 2 looked at it more carefully, and I thought this is  
10:21:02 3 probably an issue that should be briefed, that we should  
10:21:07 4 look at carefully, because this case may well not end  
10:21:14 5 with the Fifth Circuit, regardless of what they do. It  
10:21:18 6 could go to the Supreme Court.

10:21:21 7 And if I just take one position or another  
10:21:27 8 without getting the full briefing of both sides and  
10:21:30 9 carefully considering it, and it goes up to the Supreme  
10:21:35 10 Court and they say, Wow, Ezra was wrong, that wasn't a  
10:21:39 11 precedential opinion, he shouldn't have treated it as  
10:21:42 12 such, or it was a precedential opinion and he didn't  
10:21:46 13 treat it as such, the other way, it comes all the way  
10:21:51 14 back down and we start all over again.

10:21:54 15 That doesn't make any sense. I have great  
10:21:58 16 faith in the quality of the lawyers in this case. I've  
10:22:04 17 read your briefing. Your briefing is good. And I am  
10:22:10 18 looking to you to help me make the right decision here.  
10:22:16 19 That's what this is all about. Just like I did, in my  
10:22:22 20 view -- the United States doesn't agree -- when I  
10:22:25 21 dismissed their cause of action in involving Mexico  
10:22:35 22 international law. I got very good briefing on that, and  
10:22:38 23 I ruled for the State because I think, looking at it  
10:22:42 24 carefully, Texas is right. It's not a cause of action  
10:22:48 25 here. Political question.

10:22:55 1 So, again, Ms. Pettit, I want to emphasize to  
10:23:01 2 you that, first of all, I want to thank you for showing  
10:23:05 3 up. I didn't order you here, you didn't have to come  
10:23:09 4 here, and you didn't have to subject yourself to being  
10:23:14 5 questioned by me on this letter. And your willingness to  
10:23:22 6 do so says a lot, not only about you personally but about  
10:23:29 7 your belief in your office. And that I think is  
10:23:34 8 important. So I thank you very much for coming. You  
10:23:39 9 didn't have to do it. I didn't order -- I could have  
10:23:43 10 ordered you here, but I didn't. I simply requested that  
10:23:46 11 you come. And you could have said, ah, I'm not coming.  
10:23:50 12 We've got lawyers.

10:23:52 13 I want to thank counsel for her. You did the  
10:23:55 14 best job you could. You didn't -- I didn't attack her in  
10:23:58 15 any way, shape, or form. I'm not attacking her. I don't  
10:24:03 16 know whether she even actually wrote the letter. She's  
10:24:06 17 at a level where frequently other people write letters.  
10:24:11 18 And so the errors in the letter may not even be hers.

10:24:18 19 But it doesn't matter. I'm not mad. I don't  
10:24:25 20 hold grudges. In my entire career as a federal judge,  
10:24:33 21 all the cases I've handled, all the circuits that have  
10:24:37 22 heard my appeals, I have never to my knowledge been  
10:24:44 23 removed -- or my recollection -- from a case for bias or  
10:24:50 24 for any other reason.

10:24:51 25 Now I've recused myself because I had a

10:24:53 1 conflict. But I don't have a bias against the State of  
10:24:59 2 Texas, and my record here proves it. By the way, I  
10:25:04 3 handle a lot of State of Texas cases. They have nothing  
10:25:08 4 to do with big issues like we have here, and I rule for  
10:25:12 5 the State of Texas frequently. Nothing against the State  
10:25:17 6 of Texas.

10:25:20 7 I love the State of Texas, actually. I didn't  
10:25:23 8 have to become a member of the Texas Bar, but I did.  
10:25:29 9 Why? Because I'm proud to be a member of the Texas Bar.  
10:25:38 10 That's why. And my good friend, the Chief Justice, swore  
10:25:42 11 me in his office. And I'm very proud of that, too.

10:25:47 12 And let me say again: I have no animus or any  
10:25:52 13 concern about the Fifth Circuit Court of Appeals. They  
10:25:56 14 will do whatever they need to do. Now, am I always happy  
10:25:59 15 about every ruling they -- they hand down? No.  
10:26:04 16 Absolutely not.

10:26:06 17 Look. I am very good friends with many of the  
10:26:12 18 those judges. I don't know all of them well, but I know  
10:26:15 19 most of them. And I have a wonderful relationship  
10:26:19 20 with -- even like Judge Willett and I have a good  
10:26:24 21 relationship. He's a great judge. Judge Elrod and I are  
10:26:29 22 very good friends, very good friends. Judge -- Chief  
10:26:36 23 Judge Richman and I are very good friends. Judge Oldham  
10:26:41 24 and I are friends.

10:26:43 25 Now, Judge Elrod was in the majority that

10:26:47 1 reversed me in this. You think that makes any difference  
10:26:49 2 to me? Absolutely not. She was doing her job the way  
10:26:54 3 she thought she needed to do it. Judge Willett wrote the  
10:26:58 4 opinion. Do I agree with him? No. But I don't think  
10:27:03 5 that makes me a nut. There's a lot of Fifth Circuit  
10:27:09 6 judges that didn't agree with them. So I don't think I'm  
10:27:13 7 some sort of wild outlier here.

10:27:17 8 And President Ronald Reagan wasn't known for  
10:27:26 9 appointing left-wing radical jurists, and I don't think  
10:27:35 10 I've ever proven to be one. So I am going to ask that  
10:27:44 11 when you send the transcript up to the Fifth Circuit, you  
10:27:48 12 send this transcript with it, today's transcript.

10:27:55 13 MS. PETTIT: Certainly, Your Honor.

10:27:56 14 THE COURT: Okay?

10:27:58 15 MR. WALTERS: Absolutely, Your Honor.

10:27:59 16 THE COURT: Okay. Let them have both  
10:28:01 17 transcripts. If they're going to read a transcript, let  
10:28:03 18 them read it all.

10:28:05 19 MS. PETTIT: Absolutely.

10:28:06 20 THE COURT: They may be mad at me for calling  
10:28:09 21 this hearing. I don't know. But I don't think so. I  
10:28:11 22 mean, I don't think when I -- when we left yesterday, I  
10:28:16 23 thought we were on solid ground as to what we were doing.  
10:28:22 24 I thought we understood what we were doing, and we were  
10:28:25 25 going forward.

10:28:26 1 I don't think -- I really don't think either  
10:28:30 2 party, when they left -- tell me, please, if you will.  
10:28:34 3 Did any party feel that the process that I set forth was  
10:28:38 4 prejudicial or in some way did not follow what you would  
10:28:45 5 like to have been done? I don't think so. I certainly  
10:28:50 6 would have heard -- we don't have any shrinking flowers  
10:28:53 7 here.

10:28:55 8 In fact, I agreed with the State of Texas more  
10:28:59 9 than I agreed with the government -- the federal  
10:29:01 10 government. You're the government, too. You're a  
10:29:06 11 sovereign government, to use Governor Abbott's words,  
10:29:14 12 which I agree with, by the way. Texas is a sovereign  
10:29:17 13 state. It's a government, and it needs to be treated as  
10:29:21 14 such.

10:29:21 15 So that's where we are. I intend to follow  
10:29:35 16 through with the plan we worked out, and I hope when we  
10:29:41 17 hear from the Fifth Circuit -- which it's a legal  
10:29:47 18 question. You know, if the Fifth Circuit says, look,  
10:29:50 19 they're entitled to a jury trial, that will be an issue  
10:29:53 20 the Supreme Court will have to decide, ultimately. But  
10:29:56 21 you're going to get a jury trial.

10:29:57 22 I mean, I think it's an equitable cause of  
10:30:01 23 action. They're not seeking money damages. They're  
10:30:04 24 seeking to have you remove the buoy. And with respect to  
10:30:08 25 the potential of a fine, the government has not ever

10:30:13 1 indicated they're looking to recover a fine in this case.  
10:30:19 2 They're not pursuing that remedy. They just want  
10:30:23 3 equitable remedy. And, even if they were pursuing it, we  
10:30:26 4 could handle that at a later time, and it would be a jury  
10:30:28 5 trial.

10:30:28 6 But that's not -- I mean, are we even going to  
10:30:34 7 get that far? I don't know. As I said the other day,  
10:30:39 8 the United States may look at this and say, look, there's  
10:30:42 9 no really -- there's no way, given the Fifth Circuit's  
10:30:46 10 ruling, that we can adequately proceed. And that we may  
10:30:52 11 have a trial on the record and have me enter judgment,  
10:31:01 12 and then they can take their appeal, as for a *writ of*  
10:31:08 13 *certiorari*.

10:31:08 14 I guess they would have to appeal to the Fifth  
10:31:11 15 Circuit first, because that would be a trial on the  
10:31:14 16 merits, the other -- we keep forgetting that that *en banc*  
10:31:18 17 ruling was not on the merits of the case, it was on the  
10:31:22 18 preliminary injunction. This thing is so complicated,  
10:31:27 19 even I lose track of it half the time.

10:31:29 20 All right. Again, I want to thank all of you  
10:31:33 21 for being here. And, by the way, if you don't think --  
10:31:37 22 this is the really odd part of it. There's a reporter  
10:31:44 23 for *The Statesman* who I've never personally met, who  
10:31:50 24 happens to be an excellent reporter. What is his name  
10:31:54 25 again? He's already got an article out on this.

10:32:03 1 Is it Jeremy?

10:32:06 2 THE CLERK: I don't think so. I don't have  
10:32:07 3 Internet.

10:32:08 4 THE COURT: What is his name? Are you out  
10:32:10 5 here? What is your name, sir.

10:32:12 6 MR. MORITZ: Your Honor, I'm John Moritz with  
10:32:13 7 the *Austin American-Statesman*.

10:32:14 8 THE COURT: There you go. Mr. Moritz.

10:32:16 9 Mr. Moritz is an excellent reporter. I read  
10:32:20 10 his articles many times. He generally gets it absolutely  
10:32:24 11 right, which is not something that happens often. And  
10:32:30 12 he's already written an article on this, and he has  
10:32:33 13 brought out the facts in that article.

10:32:36 14 Do you think that these Fifth Circuit judges  
10:32:39 15 live in some sort of a bubble and they don't read the  
10:32:42 16 newspaper? They do. We don't all live in a bubble.  
10:32:52 17 They read the newspapers. They go to Baylor games like  
10:32:53 18 me. Judge Willett's a big Baylor fan, as is Judge Elrod  
10:33:00 19 and I. That's our connection. And Judge Richman, by the  
10:33:05 20 way, Chief Judge Richman.

10:33:10 21 Okay. And he'll write another article today  
10:33:12 22 maybe. I don't know. But he is a good reporter.

10:33:17 23 All right. Anything else you would like to put  
10:33:20 24 on the record?

10:33:23 25 MR. WALTERS: We're always happy to meet with



10:33:25 1 you, Your Honor.

10:33:27 2 THE COURT: Not always. You're about as always  
10:33:32 3 happy to meet with me as I am to always read Fifth  
10:33:36 4 Circuit opinions. Most of the time I get affirmed. You  
10:33:39 5 know, I have a really good record in front of the Fifth  
10:33:41 6 Circuit, I'm proud to say. Unfortunately, sometimes,  
10:33:46 7 when I don't get affirmed, it's the ones that you read  
10:33:48 8 about. What can you say?

10:33:54 9 Okay. Thank you. Anything else, Counsel?

10:33:57 10 MR. WADE: No, Your Honor. Thank you.

10:33:58 11 THE COURT: Anything from the people on the  
10:34:02 12 phone? Hello? Are you there? Did we lose them?

10:34:11 13 MR. LYNK: Sorry. I was muted. But nothing  
10:34:14 14 from the United States, Your Honor.

10:34:14 15 THE COURT: You may -- and I'm not telling you  
10:34:16 16 to do so. But you may want to respond to Texas's letter,  
10:34:23 17 if you wish, because it's now kind of *ex parte*. But you  
10:34:29 18 also may want to wait and see if they request it.

10:34:34 19 Generally -- but that's up to you. I'm not  
10:34:41 20 telling you to do it or not to do it.

10:34:45 21 MR. LYNK: Understood, Your Honor.

10:34:45 22 THE COURT: Okay. You do whatever you want to  
10:34:47 23 do. But I want this transcript to go up. And if Texas  
10:34:53 24 for some reason is unable to do it or didn't do it or  
10:34:56 25 doesn't do it, I want the United States to send this

10:34:59 1 transcript up. Somebody send the transcript up to the  
10:35:04 2 Fifth Circuit.

10:35:04 3 MR. WALTERS: We'd be happy to do it,  
10:35:06 4 Your Honor.

10:35:07 5 THE COURT: If you say you will, you will. I  
10:35:09 6 don't have any concerns about that.

10:35:12 7 MR. WALTERS: And, Your Honor, would you like  
10:35:16 8 us to file the -- once we get a rough transcript, or  
10:35:19 9 would you like to wait until you get a final transcript.

10:35:22 10 THE COURT: She'll get a finalized transcript  
10:35:25 11 to you today.

10:35:26 12 MR. WALTERS: For today's hearing?

10:35:27 13 THE COURT: She's really good. She's an  
10:35:29 14 excellent reporter.

10:35:30 15 MR. WALTERS: That is what I've heard. Thank  
10:35:32 16 you very much. That's been our experience.

10:35:38 17 THE COURT: Anything else? You're chatting  
10:35:39 18 among yourselves.

10:35:40 19 MR. WALTERS: No, Your Honor. We're good.

10:35:42 20 THE COURT: This is the kind of chatter we get,  
10:35:44 21 you know. For all we know, somebody in the Fifth  
10:35:47 22 Circuit -- in the Attorney General's Office, some  
10:35:50 23 appellate lawyer, might have looked at this and said,  
10:35:53 24 Whoops. We have an issue here. I think we've got a  
10:35:56 25 winner, but we need to address it when it comes down to

10:36:01 1 the opinions. Some appellate lawyer might have said  
10:36:05 2 that. And, if they did, they're smart.

10:36:07 3 Okay. Thank you very much. Court stands in  
10:36:09 4 recess.

10:36:10 5 (End of transcript)

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1 **UNITED STATES DISTRICT COURT            )**

2 **WESTERN DISTRICT OF TEXAS            )**

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